CULTURAL PROPERTY AND CONTESTED OWNERSHIP

THE TRAFFICKING OF ARTEFACTS AND THE QUEST FOR RESTITUTION

EDITED BY BRIGITTA HAUSER-SCHÄUBLIN AND LYNDEL V. PROTT

Cultural Property and Contested Ownership

Against the backdrop of international conventions and their implementation, *Cultural Property and Contested Ownership* explores how highly valued cultural goods are traded and negotiated among diverging parties and their interests. Cultural artefacts, such as those kept and trafficked between art dealers, private collectors and museums, have become increasingly localized in a "Bermuda triangle" of colonialism, looting and the black market, with their re-emergence resulting in disputes of ownership and claims for return. This interdisciplinary volume provides the first book-length investigation of the changing behaviours resulting from the effect of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. This collection considers the impact of the Convention on the way antiquity dealers, museums and auction houses, as well as nation states and local communities, address issues of provenance, contested ownership and the trafficking of cultural property. This book contains a range of contributions from anthropologists, lawyers, historians and archaeologists. Individual cases are examined from a bottom-up perspective and assessed from the viewpoint of international law in the Epilogue. Each section is contextualised by an introductory chapter from the editors.

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Preface

It was the personal encounter between the two editors, an anthropologist and a lawyer, at the workshop "The International Law of Culture: Prospects and Challenges", organised by the Interdisciplinary Research Unit on Cultural Property of Georg-August-University, Göttingen, in May 2012, that gave rise to a continuous exchange of ideas between the two scholars and finally resulted in the production of this book. In 2012, Lyndel Prott, an international expert on the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was invited to be a Fellow at the Göttingen Research Unit on Cultural Property, since one of the Unit's research projects focused on "Contested Collections. Diverging Claims of Property in Debates and Negotiations 40 Years After the Adoption of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property" (directed by Brigitta Hauser-Schäublin, Anthropology, and Tobias Stoll, International Law, and financed by the Deutsche Forschungsgemeinschaft [German Research Foundation, Bonn]; see Groth et al. 2015). In the course of this research project, an interdisciplinary team of scholars (Brigitta Hauser-Schäublin, Alper Tasdelen, Sven Mißling, Keiko Miura and Sophorn Kim) carried out research in Cambodia and Thailand on the destruction of cultural heritage in Cambodia due to looting and the illicit trafficking of antiquities.

Lyndel's presence in Göttingen over a couple of weeks allowed continuous discussions about cultural property, the 1970 UNESCO Convention, its effects, implementation and use as an instrument to protect and reclaim cultural heritage especially by formerly colonised or otherwise suppressed peoples. The interdisciplinary discussions about the examples the anthropologist Anne Splettstößer investigated, the effectiveness/ineffectiveness of the German law destined to implement the 1970 UNESCO Convention in the so-called "Patterson Case" and the claims of heirs of a former African kingdom on museums in Germany in order to have the royal symbols of their ancestors returned, were particularly rewarding. In sum, this volume came into being based on close interdisciplinary exchange and the topics chosen cover the major issues of the discussions we had rather than regional considerations. We are grateful to the Deutsche Forschungsgemeinschaft, the Georg-August University Göttingen, the Ministry for Science and Culture of Lower Saxony and the VW-Stiftung, both in Hanover; they made this venture possible.

Reference

Groth, Stefan; Bendix, Regina F. and Achim Spiller (eds) (2015): *Kultur als Eigentum. Instrumente, Querschnitte und Fallstudien*. Göttinger Studien zu Cultural Property Vol 9. Göttingen: Universitätsverlag.

Contributors

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Brigitta Hauser-Schäublin is Professor of Anthropology at Göttingen University, Germany. Having a professional background as a curator at the Ethnographic Museum in Basel, she has been specialising, in addition to other different topics, in material culture studies. She has carried out ethnographic fieldwork in Papua New Guinea, Indonesia (most recently on the indigeneity movement) and Cambodia (on the local consequences of the UNESCO listings of Angkor and Preah Vihear as World Heritage); she published and edited books on the latter two topics in 2011 and 2013: *World heritage Angkor and beyond. Circumstances and implications of UNESCO listings in Cambodia*, and *Adat and indigeneity in Indonesia. Culture and entitlements between heteronomy and self-ascription*. She is currently conducting a research project on "Contested collections. Diverging claims of property in debates and negotiations 40 years after the adoption of the UNESCO Convention on illicit trafficking of cultural property". This project is part of an interdisciplinary research unit on cultural property at Göttingen University.

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the Protection of Cultural Heritage, and also for the negotiations on the 1999 Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and for the Convention on the Protection of the Underwater Cultural Heritage 2001. She contributed as an Observer for UNESCO to the negotiations for the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995. She has authored, co-authored, or edited over 300 books, reports and articles written in English, French and German and translated into nine other languages. Currently an Honorary Professor at the University of Queensland, she has taught at many universities, including long-distance learning courses on International Heritage Law.

Anne Splettstößer studied Social and Cultural Anthropology and South East Asian Studies at Heidelberg and Berlin and graduated in 2008 (MA) with a thesis on "Socially engaged Buddhism in Myanmar", based on 13 months of fieldwork. Since 2011, she is a PhD candidate at the Institute for Cultural and Social Anthropology at Göttingen University and Research Associate in the interdisciplinary DFG Research Unit on Cultural Property in Göttingen as part of the subproject "Contested collections. Diverging claims of property in debates and negotiations 40 Years after the Adoption of the UNESCO Convention on illicit trafficking of cultural property". In the course of the project in Göttingen, she carried out fieldwork at the two largest German ethnological museums in Berlin and Munich, as well as at several sites in Cameroon in 2012/2013. Her research interests focus on material culture studies, museology, return and restitution claims and legal anthropology.

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Introduction

Changing concepts of ownership, culture and property

Brigitta Hauser-Schäublin and Lyndel V. Prott

In public discussions, cultural artefacts, such as those kept and trafficked between art dealers, private collectors and museums, have increasingly become localised in the Bermuda triangle of colonialism, looting and the art (black) market as well as ownership and claims for return. In this triangle, antiquities and ethnographic artefacts disappear from the find-spot or original cultural setting and resurface sometime later, often under "mysterious" circumstances, in other cultural, mostly transnational, locations. This triangle of displaced artefacts, the various methods and routes of their travel, and the way these artefacts are claimed in order to be returned constitutes the framework of this book.[1]

These contexts – colonialism, looting and contested ownership – are, of course, not identical with each other. Moreover, public ethnographic and antiquity museums cannot be equated with the art (black) market, dealers and private collectors. They share some commonalities, but many differences also exist, the major being the time factor. Artefacts that came to museums during colonialism refer to a different, hegemonic, world order that had its own regulations; these have to be acknowledged in their historical setting. Anton emphasised that the determination whether cultural goods have been transferred legally or illegally needs to take into account the conditions of time and place (2010:66). Nevertheless, this still allows one to critically assess these former acquisitions and their circumstances from today's perspective.

The chapters are written by scholars from different disciplines (anthropology, law, cultural studies, art history and archaeology). They explore various aspects of how highly valued cultural goods – sacred heirlooms for some actors, mere material remains, commodities or much sought-after works of art for others – are traded and negotiated among diverging parties and their interests. The starting point of these investigations was the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Subsequent questions arose: how has this Convention been implemented since its coming into force? How has it raised awareness about cultural property and ownership? How has such cultural property, first and foremost ethnographic artefacts and antiquities from non-European countries, mostly located in museums in the North, become contested and claimed by "source nations" that had suffered colonisation or other forms of oppression.

Cultural exchange and ownership in historical perspective

Cultural diversity has always been a major focus of anthropology, as have been commonalities and similarities in cultural expressions among many cultures. The circulation of goods and ideas, the various forms of movements of people and interactions between communities, whole regions, or polities have always contributed to cultural richness. This exchange has stimulated human ingenuity and boosted inventions. It also promoted people's awareness of their own traditions and the endeavour to deliberately sustain what they considered as at the core of their cultural self-understanding. In the late nineteenth and early twentieth centuries, it was diffusionism that traced the distribution of similar types of artefacts, styles, or decorations, and even of social institutions and beliefs, over large areas. Although one of the basic assumptions of diffusionism – that great innovations take place only once and then spread to large areas – proved to be wrong, the exploration of how things and ideas (including people and relationships) move through large regions and even beyond also produced insights into the interactions between communities.

From a different (nevertheless similar) perspective, the anthropology of globalisation has also been investigating the flows of goods, ideas and people across the world in different directions and intensities, and at different paces since the second half of the twentieth century. Many studies have dealt with questions of how such "things" travel, how they are localised, adapted to local cultural conditions, transformed, reinterpreted, locally reproduced – or even refused. Such studies show that complex networks of people, things and ideas arise whereby political, economic and social conditions and institutions, as well as the agency of individual actors, shape the framework within these movements taking place. Different forms of interactions are at the core of the processes of the dissemination and travelling of goods, ideas and peoples.[2] These interactions comprise marriage and other alliances between kinship groups and polities, market, trade and other exchange relations, gift relations – but also violent interactions, such as assaults, raids and wars. All these forms of interactions and the subsequent movement of tangible and intangible cultural property have contributed to cultural diversity, notwithstanding the context of armed conflict, which is estimated as unacceptable from today's perspective (see also the section on "The development of property laws"). The idea that an artefact, especially if it is a sacred one or identity-generating, belongs to a "source community"[3] dominates many negotiations about the return of cultural property.[4] In the current discussions about the return or restitution of cultural property acquired under dubious conditions, by violence, including plunder, or during the colonial era, the time factor no longer appears to be a major point, since ethical questions and issues of reconciliation seem to have become more important (Prott 2009a; Ulph 2012a:22–3; Hauser-Schäublin 2013a).[5] Nevertheless, the time factor remains significant – for example, the problem of the lack of retroactivity of the international conventions – and also needs to be considered today, especially against the backdrop of historical cases that seem to be "time-barred".

We would like to briefly discuss this problem, which also touches the problem of contested ownership of the cultural property, by presenting two historical examples from Europe in which the cultural property was transferred in the form of war booty, but resulted in opposite consequences. In both cases, the *corpus delicti* has survived up to the present. The first case concerns the relics of the Magi kept in Cologne Cathedral, which was listed as a UNESCO World Heritage site in 1996. These relics are the result of what is called in today's phrasing "war booty" or "pillage". They are stored in "the largest reliquary shrine in Europe", which was constructed in the late twelfth and early thirteenth centuries (http://whc.unesco.org/en/list/292 (accessed 12 January 2015)). These relics were said to have been taken from Constantinople and transported to Milan in the fourth century. According to the legend, these bones were kept in a sarcophagus dating back to the third century in Milan's S. Eustorgio church. When Friedrich Barbarossa, Holy Roman Emperor of German descent, conquered and sacked Milan in 1162, he seized the relics as war booty. He presented them to one of his close advisors, Rainald von Dassel, Archbishop of Cologne and Imperial Chancellor, who had accompanied him on his Italy campaign. In 1164, the relics were transferred to Cologne and placed in the centre of Cologne Cathedral. A precious reliquary was made for them in which these relics are still kept and venerated. The relics became important symbols of power, especially in the coronation ceremonies of kings, thus giving rise to new traditions. The relics have become an inseparable part of Cologne Cathedral, as the UNESCO listing illustrates.[6]

Relics have their own biography of acts of violence and dispossession, and illustrate how such artefacts have moved through many countries over centuries and become inalienable "heritage" (Geary 1994). Thus, as the example of Cologne illustrates, these artefacts have got rid of their stigma of war booty, theft and plunder.[7] Such cases can be classified as what Cornu and Renold called "purged by time" (2010:15).[8] The UNESCO listing has indirectly legitimated the relics of the Magi as part of the heritage of Cologne.

Other items still serve as a memorial for an injustice suffered and the successors of their former owners have kept claims for restitution alive, even through centuries. Such is the case in what is called the "cultural property conflict" (*Kulturgüterstreit*) which followed the plundering of the abbey of Saint Gall in 1712 in the context of the *Konfessionsstreit* between Protestant and Catholic cantons in Switzerland. In addition to 11,000 precious manuscripts and books from the abbey library, the aggressors (the cantons of Zurich and Berne) also took a number of works of art with them. Among them was a unique earth and celestial globe (*Erd- und Himmelsglobus*; 121 centimetres in diameter, more than 2.33 metres high) dating back to the second half of the sixteenth century (probably made in Augsburg). The globe was later kept in the Landesmuseum in Zurich. Peace negotiations between Zurich and the library of the abbey resulted in the restitution of only parts of the collection of manuscripts and books in 1720. However, the plundering never fell into oblivion.

It was in 1995 that the parliament of the canton of St. Gall addressed the issue of the restitution of the globe again; it even considered filing a constitutional lawsuit (*staatsrechtliche Klage*) against Zurich and asked the Swiss Federal Council for mediation. Complex negotiations followed which resulted in an agreement between the parties and terminated the cultural property conflict in 2006. The agreement was a compromise: First, St. Gall agreed to recognise the property rights concerning the plundered artefacts of Zurich as a consequence of the 1712 events. Secondly, forty manuscripts of special value ("identity value", *Identitätsrelevanz*) were returned to the abbey library on loan, but remained the property of the Foundation Central Library in Zurich, for an unlimited period (subject to notice after 38 years for the first time). It was agreed that the earth and celestial globe would remain in Zurich, but a replica of it was made and paid for by Zurich. This replica was presented as a gift to St. Gall in a ceremony in 2009 (Präsentation 2009; Cornu and Renold 2010:20).

The start of a new era?

Thus, events of war have turned the plunderers (or rather their heirs) into the owners of the stolen goods – at least as far as some historical periods are concerned.[9] From today's perspective, the international discussions and negotiations about the return or restitution of stolen cultural property during armed conflicts (also during colonial times) may, at first sight, appear rather astonishing. However, the international situation has changed substantially in the meanwhile, not least due to the international community, such as the UN, but also regional organisations, such as the EU with their policy of fostering international understanding, cooperation and peace. The return and/or restitution of plundered or stolen cultural goods are seen as an important step in achieving these goals.

Consequently, the post-colonial looting and clandestine trafficking of artefacts/antiquities are no longer tolerated and the international communities, such as the UN, UNESCO and other actors, have developed international conventions and national laws to fight this (see, for example, Prott 2009a; Mackenzie 2005; Ulph and Smith 2012). From today's perspective and taking the current legal frameworks as a benchmark, the question of ownership is raised when works of art are offered at auctions, by art dealers or on the Internet, and also regarding already existing collections in public museums. The question is, under what circumstances an artefact – whether ethnographic artefact or antiquity – has been acquired and traded to the institution where it is held. Thus, the provenance or the collection history of the artefact or antiquity has become prominent, especially in the international art market.[10]

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (see Lalive 2009) are the two most important international governing instruments to protect cultural property and aim to prevent its illicit trafficking in peacetime.[11] The 1970 UNESCO Convention, which is binding for the states parties that have ratified it, has contributed substantially to the awareness of the problem of

unlawful appropriation of cultural goods, their significance as symbols of identity and self-determination of formerly oppressed communities and states, and of illicit trafficking. The UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, which came into being in 1978, promotes the implementation of the Convention in cases where assistance is sought. It is an important actor that facilitates bilateral negotiations between requesting and holding states. It assists those member states of UNESCO which "have lost certain cultural objects of fundamental significance and are calling for their restitution or return, in cases where international conventions cannot be applied" (UNESCO 2015a).

Although there have only been eight cases dealt with by the Committee in the course of over 35 years, and only six have been solved (with the contested artefacts returned), the impact it has had on many other cases of return cannot be overestimated. Additionally, the UNESCO Committee often acts successfully behind the scenes (see Chapter 3). The repatriation of reclaimed artefacts to the country of origin requires administrative and regulatory efforts to ensure the correct handing over to the rightful owner, be it a museum or a local community. The complexity and sensitivity of such logistics becomes apparent especially in the context of ancestral remains (see Chapter 8). The public discussions during the UNESCO Intergovernmental Committee's sessions between claiming and holding nations about contested artefacts are anything but status-enhancing for the holding states and the museum on behalf of which they are acting. As a consequence, museums and states try to avoid entering such formalised processes which are publicised to a worldwide audience. Instead, bi-national and confidential negotiations are preferred and solutions found that include a broad variety of methods of "return", such as gifts, loans, or replicas (Cornu and Renold 2010; Hauser-Schäublin 2013b).

Some renowned states have not signed the 1970 Convention (or have done so only lately) for different reasons. However, the 1970 UNESCO Convention and the Intergovernmental Committee have had an impact on such states as well. Several of them have preferred to establish bilateral agreements to regulate the illicit trafficking of art and the return of illegally exported or imported artefacts, such as Cambodia and Thailand, with differing success. This is not due to the contents of the agreements, but, first and foremost, to their implementation and the authorities responsible for it (see Chapter 2). In sum, conventions and agreements work effectively only in so far as they are implemented in the way required.

From admiration to scepticism

Most of the ethnographic artefacts and antiquities are housed nowadays in western museums (not to mention the innumerable private collections all over the world).[12] Most of these artefacts were acquired during imperial expansion or conquest and colonialism. These collections, which sometimes developed in the course of centuries, have become archives of human cultural diversity, aesthetic achievements, skills and knowledge (Cuno 2006). Moreover, most of these artefacts are unique historical testimonies, as the majority of the societies from whence the

ethnographic documents came had no records in writing and all these societies have changed fundamentally since. Additionally, most of these societies continuously produced new artefacts, replacing old ones whenever they felt that the latter had lost their powers, while a substantial number of the ethnographic artefacts were more or less recently made when they were acquired.[13]

Over the past forty years, the way of looking at such collections has shifted from mere admiration for their expressiveness and beauty to questioning their provenance. For a long time, such artefacts were implicitly assumed to be owned and rightfully kept and exhibited in public institutions with an educational mission and under the custody of researchers and conservation experts. The ideology of these institutions were/are implicitly legitimated by an imagined sense of global responsibility for such art pieces as unique cultural documents of humankind and an attitude of cultural internationalism (in Merryman's sense, 1986, but see Prott 2005). The Declaration on the Importance and Value of Universal Museums (signed in 2002) underlines this aspect (but see Prott 2009a:116–49). However, these "objects" developed an agency when "source countries" or even "source communities" raised their voices and claimed legitimate ownership of the artefacts which, thus, needed returning.[14] What museums had considered as collections of inert objects suddenly developed an agency of their own, which turned them into "subjects". For the countries of origin, they became symbols of colonialism, violent appropriation and wrongful assertion of ownership. The reasons for this change in the perception of artefacts and ownership are manifold.[15] One of the most important reasons is certainly the changing world order, which has brought forward many voices that were formerly either unheard or silenced. These voices came from communities and nations that were formerly colonised or otherwise oppressed. The first and most prominent claims came from those peoples who lived in countries which remained dominated by western invaders and settlers, the so-called "settler states". The native or aboriginal inhabitants in the United States of America, Canada, Australia and New Zealand became the vanguards in a movement that gradually spread to all continents. They started to demand their recognition, their dignity and their rights (Merlan 2013). Among these rights were, first and foremost, their customary rights over land and landownership and resources in general.[16] They also demanded, apart from being granted full citizenship, the right to keep control of their culture and to perform and develop their own identity according to their own will. Thus, these communities – who have chosen new names for themselves, such as First Nations peoples or natives and indigenous peoples, formerly rather derogative terms (see Kuper 2003) – have freed themselves from being defined by others. Instead, they present themselves with a new self-chosen identity.

Cultural empowerment of the dispossessed

Tangible and intangible cultural features serve as essential testimonies of the particular history over which those communities which call themselves First Nations or indigenous peoples struggle to regain control (see Coombe 1993; Hauser-Schäublin 2013a). Human remains and artefacts were taken from them

by colonisers in various ways (not simply stolen or forcefully taken, but explorers were often invited to buy such artefacts; see, for example, Schindlbeck 2013), almost always in an unequal power relationship. Meanwhile, these things have become important material and immaterial elements in the struggle of the communities for cultural self-determination and autonomy. These communities are usually denominated as "source communities". The revitalisation of traditions and, accordingly, the recourse to "traditional cultural expressions", as spelled out, for example, in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression, have fostered local communities' endeavours to re-evaluate artefacts manufactured by former generations of individuals and communities whose direct heirs they claim to be.[17]

Viewed from a different angle, a claim for the return of human remains and artefacts allows formerly dispossessed communities a repositioning towards those formerly more powerful (Li 2000). Although many of these material testimonies had been acquired corresponding with the regulations and moral understanding of the colonisers and their time, it is today's ethical imperative that endows these claims with authority and prompts museums to return claimed artefacts (first and foremost ancestral remains, see Chapter 8).[18]

Consequently, many of the formerly colonised or otherwise oppressed communities and countries have identified some ethnographic and archaeological artefacts predominantly housed in museums of the countries in the North as their particular heritage and, therefore, material symbols of their identity (Kuprecht 2014). Since such communities consider such artefacts as inalienable, as cultural heritage, they claim to be the one legitimate owner. Subsequently, many museums in many countries in Europe, the United States and Canada have been confronted with claims from such countries and communities to return single artefacts or whole collections (see Chapter 6).[19]

As briefly mentioned previously, the situation of indigenous communities in settler states differs from other countries. Yet, the communities in these settler states led a pioneering effort in this movement for recognition and self-determination, including the restitution of cultural goods. A cornerstone in this by now worldwide move was the Native American Grave Protection and Repatriation Act (NAGPRA), an American federal law enacted in 1990. This law promotes the return of Native American "cultural items", such as sacred or otherwise important objects including human remains, to lineal descendants, culturally affiliated Indian tribes and Native Hawaiian organisations (see Prott 2009a: 263–302). Furthermore, this law states that federal institutions (those receiving federal funding) are obliged to set up an inventory of all sensitive objects; the latter shall be repatriated on request.

The question of ownership and whose property these contested artefacts really are, has prompted many museums to trace the history especially of contested collections and artefacts. However, the identification of unambiguous legal circumstances which would allow a distinct decision about the ownership of a contested artefact is difficult. In such cases of claims for return or restitution, the legal situation in the source and destination country at the time when the

artefact or the collection was acquired, as well as at the time of the dispute, must be considered.[20] Consequently, legal procedures are complicated. Additionally, the existing legal instruments are often cumbersome, which makes their application difficult and results in failure (see Chapter 7).

Provenance and the trafficking of artefacts

Today, antiquities can rarely be officially traded without documentation of the origin of the artefact and its collection history. An artefact without provenance poses the risk to the art dealer or collector of becoming confronted with data that prove its illegal origin. The obligation to provide an artefact with documentation of its acquisition history has resulted in a proliferation of "certificates" that should dissipate any doubts about theft or looting. For decades (or even centuries), questions of provenance and circumstances of acquisition and ownership did not surface prominently, but remained hidden behind the aesthetic fascination of connoisseurship and the appreciation of enduring preservation.

Nevertheless, the black market for antiquities is flourishing and artefacts are moved around the globe faster than ever before. This market is said to have stepped into the second position of the worldwide black market after drug trafficking, by replacing the arms trade. As a consequence of the increasing demand and the shortage of supply, the profits from the illicit art trade have risen to those gained from drug trafficking (Anton 2010:37).[21] It is, therefore, not surprising that each time a new conflict hotspot erupts, the art trade criminals immediately appear and loot everything – whether from museums and archaeological sites, but also private dwellings, religious institutions and workshops – that seems to be a promising commodity for supplying the illicit art market. The plundered artefacts are quickly transported outside the conflict zone and away from the country of origin and appear only a short time later on the art market for sale, preferably through the Internet. Even renowned auction houses and art fairs have sold artefacts originating from such hotspots and possessing only poor or non-verifiable provenances (Davis 2011; see also Chapter 1).

Some academics often co-operate with illegal traffickers of artefacts – whether these are ethnographic artefacts or antiquities – when they, perhaps rather thoughtlessly or unaware of their decisive role, agree to authenticate these cultural testimonies (Brodie 2011a:129–31). Only when they provide these artefacts with information based on their expertise, do these commodities gain the status of a "real" piece of art that is worth its price (or rather vice versa: the price of a piece of art rises with its verification), since fakes constitute a considerable portion of these marketable goods (Ulph 2012a:3; see also Chapter 5). Academics, therefore, contribute substantially to the functioning of the art black market (Brodie 2011b). However, most of the stolen pieces remain hidden by dealers and are offered only in "backrooms" to those private collectors who are not bothered about illegality. The antiquity collectors (whatever their moral attitude towards illicit trafficking) form the majority of the targeted "consumers" of the goods offered on the market; in contrast to drug consumers and combatants equipped with weapons from the

black market, antiquity collectors always belong to a social and economic elite that takes pride in its connoisseurship, of which antiquities and other works of arts are thought to give testimony.[22]

Many of these antiquities cannot be identified and confiscated, and it seems to be only the tip of the iceberg that is tracked down and identified, for example, by Interpol (see Kind 2011). Getting hold of stolen or looted artefacts implies that a detailed description, including pictures, exists. However, most looted or stolen artefacts from archaeological sites and sacred shrines are either unknown or have never been registered as "objects", such as museums usually do (Ulph 2012b:259–62; Hauser-Schäublin 2012:75–6; see also Chapter 7).

As briefly mentioned previously, plundering – at least regarding the initiators and the final links in the chain – is a white-collar crime, thus, a crime of the powerful (Mackenzie 2011). Local people – most of them poor and deprived of a decent means of living – mostly serve as stooges. They perform what Brodie (following Staley 1993) called "subsistence digging", and sell the items they get hold of for a minimal price for the sake of survival (Brodie 2010; see Chapter 1). Such plundering has happened in Iraq, Afghanistan, Egypt and Syria, to mention only a few countries (Brodie 2010; Bogdanos 2011). The market for antiquities over the past ten years has rapidly expanded into countries with rich elites far beyond Europe or North America (Anton 2010:41). Therefore, the art market demand is still rising and exceeds the supply by far.[23] The plundering of archaeological sites and museums is the consequence of this insatiable demand. The current urgent appeal by UNESCO to draw the attention of the international community to the immense devastation and plundering of antique sites in Syria, and many countries' bans on the import of antiquities from Syria are the most recent examples.[24] Although the plundering of archaeological sites, including those underwater, and thefts from museums are a worldwide problem, the situation in economically and/or politically unstable countries is much worse (see Chapter 4). Other loopholes are the inadequate protection of sites, corruption and weak institutions responsible for the protection of such locations and the control of export/import. The flow of antiquities is directed and, therefore, goes from such countries, often called "source nations", to "market nations" (Merryman 1986). Yet, market nations, or rather "destination nations", are those countries where the artefacts finally enter private collections or museums. It is also useful to speak about transit nations, those which often serve as an intermediary between source nations and destination nations. These transit countries play a crucial role as market places of – especially Asian – antiquities, since some of them are free transition ports where stolen antiquities or fakes are whitewashed and provided with a new biography. One of the main goals that is achieved in these free transition ports is to turn cultural artefacts that were illegally removed from one country and then transported across the border into a market country into licit artefacts by providing them with "certificates" and to, subsequently, launch them into channels of the legal art market (Anton 2010:52; see Chapter 5).

Most of these transit countries have not ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. However, ratification of the

latter does not imply that illicit trafficking of antiquities or other cultural documents is non-existent in every state party. Considerable discrepancies sometimes exist between the two, as our research has shown (see Chapter 2).

Property, heritage and ownership

The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions has raised the awareness of the value of cultural diversity worldwide. Together with the 1972 UNESCO World Heritage Convention and the 2003 UNESCO Intangible Heritage Convention, culture has become an important governing instrument to achieve the recognition of cultural minorities. Simultaneously, a propertisation of culture has set in, not least as a result of the conventions' emphasis on culture. The identification and description of particular cultural elements leads to an objectification of culture and suggests that people not only have, but also own, "culture". The UNESCO listing of some cultural elements or achievements as outstanding accomplishments of humankind emphasise the idea that culture can be owned.

The term "cultural heritage" has largely replaced the term "cultural property" in the international, mostly legal, debates about the return and restitution of artefacts that were illegally trafficked, removed without consent by the owners or even plundered (for example, war booty, Splettstößer 2014; see also Chapter 6). Prott and O'Keefe argued from a legal perspective by pointing out that property law deals primarily with the protection of the rights of the owner, while the "fundamental policy behind cultural heritage law is protection of the heritage for the enjoyment of present and later generations" (2012:5). Since the aims of the two laws differ substantially from each other, they plead for using the term "heritage". This change of terminology, which expresses the awareness of the goals of these laws and the institutions that rely on these concepts, is also expressed in international conventions. Thus, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict coined the concept of "cultural property", as well as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. However, the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage uses, as Prott and O'Keefe show (2012:14), the phrase "cultural heritage" instead. All later international conventions use this term too, such as the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage and the 2007 UN Declaration of the Rights of Indigenous Peoples. All these conventions share the goal of protecting and preserving cultural heritage for present and future generations. This normative end even considers the possibility that other people than the owner may have access to a particular cultural heritage: "It may involve restrictions on the right of the possessor whether that be an individual, a legal person, a community or a State" (Prott and O'Keefe 2012:5).

Not all states have followed this terminology, as suggested, for example, also by the 2001 UNESCO Convention on the Protection of the Underwater Cultural

Heritage (in force since 2009; UNESCO 2015b). Indonesia, for instance, does not use the term "heritage" (*warisan*, *pusaka*) in the laws relating to shipwrecks, but speaks of "cultural property". The reason is that Indonesia thereby reserves its right to either economically exploit shipwrecks or protect them (see Chapter 4). *Warisan* or *pusaka* would exclude economic exploitation.

From an anthropological perspective, cultural heritage is not an analytical category but a value-loaded concept, since it anticipates that a material or immaterial "thing" is considered by the people concerned and/or by outsiders as a heirloom, something handed down from the ancestors to the present generation (or particular members of it), who will forward it according to rules of inheritance to the next. Heritage as a concept is primarily a culture-specific notion with its specific definition and application and not an abstract pervasive category. Heritage, in this generalising sense as used in conventions, is, to use a famous formulation by Kirshenblatt-Gimblett (1998), already the result of "a cultural production that has recourse to the past and produces something new. Heritage as a mode of cultural production adds value to the outmoded by making it into an exhibition of itself" (1998:149). In short, heritage as a generalising concept is a normative concept (associated with safeguarding, preservation and conservation) and expresses an added value: those items declared as cultural heritage are ranked above others that are not classified as such.

Yet, both concepts – property as well as heritage – imply ownership. Most of the discussions dealing with the rightful ownership of artefacts take the (Western) notion of private property as a starting point (Hann 1998:1–5). This implies that there can be only one rightful party of a material object, whether this is an individual (private property) or a community (common property). Thus, the Western concept of ownership implies a relationship between a (mostly living or once living) human being that "owns" an inanimate object, but rarely the other way round. The division between a subject (the owner) and object (the owned) is a basic assumption in this concept.[25] From a culture-comparative perspective, however, we must also acknowledge different relationships between "subject" and "object", even to the extent that the latter is provided with an agency that goes far beyond an ("inert") object, but is, rather, an agent on its own (Gell 1998). On the other hand, different forms of ownership may exist simultaneously which create a complex set of property relations between the people associated with the artefact. The owning of the material aspect, the artefact, is prioritised in most of the debates about a contested artefact or collection. However, property as a material thing covers only one aspect of ownership or property rights. The factual authorship, that is, the artist or craftsman/craftswoman who created the artefact, and their possible rights or those of their descendants are rarely considered. Instead, most of the non-Western works of art are dealt with as anonymous objects or as if they were genuine "folk art", art produced by an (imagined) community. Additionally, there may be a number of rights, each with a particular notion of ownership linked to it: the right to carve or paint a particular statue or to reproduce an ornament, the right to tell the story linked to the artefact, the right to display, store, or even destroy it, the right to see it and to bequeath it as a heirloom to a particular heir and the right to

sell or pass it as a gift to somebody. All these rights, which imply different forms of ownership and property, need to be considered equally in the analysis of claims for return and restitution of cultural property.

The development of property laws

From the seventeenth to the nineteenth centuries, Western nations jealously developed their own law, often seeing their national law specifically as their own and unique, not infrequently departing from the general Roman law revived as the basis of the differing continental European codes, even though they were in the same family. The Common Law developed by the English judges was used widely as a basis for most English-speaking countries. There was indeed even rivalry between states as to who had the best law: in that period, there was little interest in harmonising legal rules in Europe, and this desire to have a distinct national law was followed by other countries around the world. One key concept widely accepted by both Roman and common-law legislators was that of "property", though some states trumpeted property of the individual (English common law) while others enforced the concept of state property (communist countries) and yet many other states proceeded somewhere on the scale between these two extremes. This was particularly interesting concerning artworks, since France adopted the rule that the contents of all state museums, including municipal museums, were state property, whereas the United Kingdom regarded all its museums as private owners.

During the twentieth century, there has been a significant movement away from that point of view. International law, based first on multilateral treaties, has developed an important corpus of multilateral conventions, bilateral treaties, recommendations, guidelines and standards, some created by the new international bodies (the League of Nations, United Nations) and by their now many subsidiary bodies (such as UNESCO) which, by the end of the last millennium, provided a substantial body of law and appropriate standards, increasing every day. The last hundred years have also shown a much greater interest in harmonising these principles, largely because of the immense destruction caused by two world wars and by the need to regularise the processes of non-violent contact, trade and other matters where intense interaction was taking place. Thus, the sacrosanct national laws on property and heritage are now challenged by the principles of widely accepted international conventions.

The term "cultural property" was adopted in 1954 when the drafters of the Hague Convention of Cultural Property in the Event of Armed Conflict were searching for a useful phrase to cover the complex list of the movables and immovables of artistic, historical or archaeological interest defined in it (Art. 1). The use of the phrase "cultural property" seemed to be related to national property laws since "international property" was hardly conceivable. Since then there has been a striking development of efforts to protect cultural objects and structures which are significant for understanding past and present cultures and needed for the education and appreciation of the world's most inspiring achievements.